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October 16, 2017

VIA, ELECTRONIC FILING

The Honorable Jocelyn Boyd
Chief Clerk and Administrator
The Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29210

Re: • Whitetail Solar, LLC; Rhubarb One LLC; Cotton Solar, LLC; and
Shorthorn Holdings, LLC,

Complainants,

v.

Duke Energy Carolinas, LLC and Duke Energy Progress, LLC.

Defendants.

• **Complaint**

Dear Ms. Boyd:

Enclosed for filing, please find the above-referenced Complainants' Complaint and Docket Cover Sheet. Please notify the undersigned if you there is anything else you may need.

Respectfully Submitted,

/S/ _____
Richard L. Whitt

RLW/cas

**BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2017-____-E**

| | | |
|--|---|------------------|
| IN RE: |) | |
| Whitetail Solar, LLC; Rhubarb One LLC; |) | |
| Cotton Solar, LLC; and Shorthorn Holdings, |) | |
| LLC, |) | |
| |) | |
| |) | |
| Complainants, |) | COMPLAINT |
| |) | |
| v. |) | |
| |) | |
| Duke Energy Carolinas, LLC and |) | |
| Duke Energy Progress, LLC, |) | |
| |) | |
| Defendants. |) | |
| |) | |

INTRODUCTION

Birdseye Renewable Energy is a developer of solar photovoltaic generating facilities in South Carolina. Complainants, referenced above, are corporate subsidiaries of Birdseye Renewable Energy, created to facilitate the development of such projects.

The Complainants, acting through their legal Representative, pursuant to R-103-824, of the South Carolina Code of Regulations of the Public Service Commission, and other applicable Statutes and Regulations, complains against Duke Energy Carolinas, LLC and Duke Energy Progress, LLC, (hereinafter together as, "Duke"), showing specific violations of Commission Orders, as set forth hereinafter and specific violations of the Public Utility Regulatory Policies Act of 1978, as set forth herein, with appropriate grounds as follows.

NATURE OF ACTION

This action arises from Duke's stated refusal to enter into long-term Power Purchase Agreements ("PPA") with the Complainants, Renewable Energy Projects, located in South Carolina. All of the Projects are certified as qualifying facilities ("QFs") under the Public Utility

Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 (“PURPA”), and as such are entitled to sell their power to Duke pursuant to long-term Power Purchase Agreements (“PPAs”).

Complainants are developing solar generating facilities and have requested long-term PPAs for the Projects with Duke. Contrary to its longstanding practice, Duke has recently refused to enter into long-term PPAs for the Projects with Complainants, and has announced its intention, going forward, not to enter into PPAs with a term longer than five years with QFs that are not eligible for Commission-approved standard offer rates and contract terms.

Through this action, Complainants seek to compel Duke to engage in good-faith, negotiations with Complainants regarding long-term PPAs, as required by Orders of this Commission and to fulfill Duke’s legal obligation to enter into PPAs of long enough duration to provide reasonable opportunities for the Projects to attract financing, as required by PURPA.

COMPLAINANTS/PARENT COMPANIES

Birdseye Renewable Energy.

1. Birdseye Renewable Energy is a North Carolina Limited Liability Corporation, doing business in South Carolina through its subsidiaries and affiliates.
2. Birdseye Renewable Energy is the corporate parent of the following entities (collectively, “the Birdseye Projects”, or, “Complainants”), each domesticated to conduct business in South Carolina, to develop solar photovoltaic generating facilities in South Carolina.

BIRDSEYE PROJECTS:

- a. Whitetail Solar, LLC;
 - b. Rhubarb One LLC;
 - c. Cotton Solar, LLC; and
 - d. Shorthorn Holdings, LLC;
3. The Projects are seeking commercially reasonable, long-term PPAs with Duke.

DEFENDANTS

Duke Energy Carolinas, LLC.

4. DEC is a South Carolina Corporation, duly organized and conducting business in the State of South Carolina and is a Public Utility subject to the jurisdiction of this Commission.

Duke Energy Progress, LLC

5. DEP is a South Carolina Corporation, duly organized and conducting business in the State of South Carolina and is a Public Utility subject to the jurisdiction of this Commission.

COMPLAINT

1. Complainants are developing solar photovoltaic generating facilities in various locations in South Carolina.

2. Each of the Birdseye Projects, is certified as a QF under PURPA, and is a Renewable Energy Facility under the South Carolina Distributed Energy Resources Act, §§ 58-39-110, *et seq.*, (S.C. Code Ann., 1976, as amended).

3. Under Section 210 of PURPA, each of the Projects has the legal right to sell all of its output to Duke pursuant to a PPA or other legally enforceable obligation. 16 U.S.C. § 824a-3; 18 C.F.R. §§ 292.303(a), 292.304(d).

4. PURPA requires the Federal Energy Regulatory Commission (“FERC”) to implement the mandatory purchase obligation, requiring electric utilities to purchase electric power from QFs. *S. Cal. Edison Co. v. FERC*, 443 F.3d 94, 95 (D.C. Cir. 2006), (citing PURPA Section 210(a)(1)-(2), 16 U.S.C. § 824a-3(a)(1)-(2)). State regulatory authorities are, in turn, required to implement PURPA in a way that gives effect to FERC’s own regulations implementing PURPA. *See* PURPA Section 210(f)(1), 16 U.S.C. § 824a-3(f)(1); *FERC v. Mississippi*, 456 U.S. 742, 751 (1982).

5. FERC has said that under PURPA, qualifying facilities are entitled to “**long-term** avoided cost contracts or other legally enforceable obligations (“LEOs”), with rates determined at the time the obligation is incurred, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred.” *JD Wind I, LLC*, 130 FERC ¶ 61,127, P 23 (2010), (emphasis added).

6. FERC, has concluded that reasonable certainty as to the long-term revenue stream of a solar QF is essential for obtaining financing. Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,880, 30,868; *Windham Solar LLC & Allco Fin. Ltd.*, 157 FERC ¶ 61,134. A long-term PPA at fixed rates is the only practical way to provide such certainty for a QF located in the service territory of a vertically integrated, fully regulated electric utility (such as Duke in South Carolina) where QFs cannot make retail sales and where there is no practical access to wholesale markets.

7. In a regulated market like South Carolina, a solar generating facility generally must obtain a PPA before it can be financed or constructed.

8. In general, the longer the duration of a solar project’s fixed-price PPA, the easier it is for developer to obtain financing for the project. Conversely, the shorter the duration, the more difficult it is to obtain financing.

9. FERC has not, by regulation or by order, specified a minimum or maximum term for PPAs entered into between electric utilities and QFs under PURPA. However, FERC has held that QFs are entitled to contracts “long enough to allow QFs ***reasonable opportunities to attract capital*** from potential investors.” *Windham Solar LLC & Allco Fin. Ltd.*, 157 FERC ¶ 61,134 at P. 8 (Nov. 22, 2016), (emphasis added). In other words, under PURPA a QF is entitled to a PPA of sufficient length to be reasonably financeable.

10. For projects with a nameplate capacity of two megawatts (“MW”) or less, the Commission has approved Duke’s offer of standardized PURPA contracts with a maximum duration of ten years. *See*, this Commission’s Docket No. 1995-1192-E, Order No. 2016-349 (approving DEC standard contract); and this Commission’s Docket No. 2016-227-E, Order No. 2016-871, (DEP standard contract).

11. Each of the Projects, as defined herein, has a nameplate capacity in excess of two megawatts and is not eligible for a standard contract.

12. The Complainants have requested commercially reasonable, long-term PPAs from Duke.

13. In response to Complainants’ requests for PPAs and rates for the Projects, Duke has refused to offer long-term PPAs, but instead has offered PPAs with a term of only five years. Duke has communicated to the Complainants that Duke prospectively intends to only offer Solar Developers in South Carolina PPAs with a maximum duration of five years.

14. Notwithstanding Duke’s recent refusal to enter into PPAs with a term longer than five years, Duke historically has entered into PPAs with Solar QFs in South Carolina with durations substantially longer than five years.

15. A PPA with a duration of no more than five years is not long enough to allow the Projects reasonable opportunities to attract capital from potential investors, and Duke’s offer is not made in good-faith, as required by this Commission. Complainants are unable to secure financing for construction of any of the Projects based on the five-year PPA term offered by Duke.

16. Duke's nonregulated corporate affiliate, Duke Energy Renewables ("DER"), develops, owns, and maintains a portfolio renewable generating assets in the United States, including approximately 50 solar generating facilities with a total capacity of approximately 600 MW. Almost all of DER's solar projects sell their output to utility offtakers pursuant to long-term PPAs. DER advertises the duration of these PPAs on Duke Energy's corporate website.

17. The PPA durations for DER's solar facilities over 2 MW, for which Duke Energy has publicly disclosed information about PPA duration, are as follows:¹

| Project Name | State | Capacity (MW) | Offtaker | PPA Term (years) |
|----------------------|-------|---------------|--|------------------|
| Blue Wing | TX | 14 | CPS Energy | 30 |
| Sunset Reservoir | CA | 4.5 | San Francisco Public PUC | 25 |
| Ajo | AZ | 5 | Arizona Public Service Co. | 25 |
| Bagdad | AZ | 15 | Arizona Public Service Co. | 25 |
| Stanton | FL | 6 | Orlando Utilities Commission | 20 |
| Murfreesboro | NC | 5 | NCEMC | 20 |
| Black Mountain | AZ | 10 | UniSource Energy Services | 20 |
| Gato Montes | AZ | 6 | Tucson Electric Power Company | 20 |
| Washington Whitepost | NC | 12.5 | NC Eastern Municipal Power Agency (NCEMPA) | 15 |
| Highlander I & II | CA | 21 | Southern California Edison | 20 |
| Millfield | NC | 5 | NCEMPA | 15 |

18. Based on information made publicly available by Duke, none of the solar generating facilities owned by DER with a capacity similar to that of the Projects (*i.e.*, over 2 MW) sells its output pursuant to a PPA with a duration of fifteen years or less.

19. Based on information made publicly available by Duke, none of the solar facilities owned by DER sells its output pursuant to a PPA with a duration of less than ten years.

¹ This information is available on Duke's corporate web site at, <https://www.duke-energy.com/our-company/about-us/businesses/renewable-energy/solar-energy>. DER has other solar projects for which it does not publicly disclose information about the duration of its PPAs.

20. When procuring solar generating capacity through competitive solicitations in North Carolina and South Carolina, Duke has sought PPAs with terms as long as twenty years. In a competitive solicitation for renewable resources (including solar) in Florida, Duke Energy Florida has required generators to propose PPAs with a term between ten and thirty-five years.

21. A PPA with a five year duration: (i) is not commercially reasonable (ii) is not offered in good-faith as required by the previous Orders of this Commission, cited by Complainants and (iii) would render all Solar Developer projects located in Duke's assigned territory unfinanceable.

22. Duke is aware that utility-scale solar projects cannot be financed with five-year PPAs, and that by refusing to offer PPAs with longer terms, Duke is effectively preventing the development of utility-scale solar generating projects, pursuant to PURPA in its South Carolina service territory.

Violation of Previous Commission Orders.

23. Duke is under specific order from this Commission to negotiate in good-faith in its purchase of electrical energy. See, on page 26 of Commission Order No. 85-347, dated August 2, 1985, Docket No. 80-251-E.

24. Further this Commission has encouraged that, in circumstances where agreement cannot be reached, the aggrieved party present the issue for resolution before this Commission, by way of a formal Complaint. See, page 28 of Commission Order 85-347, dated August 2, 1985, Docket No. 80-251-E. It is understood that the Orders of this Commission continue in force, until further order of this Commission.

25. Based on the facts set forth hereinabove, Duke has not acted in good-faith in its negotiations with the Solar Developer, as is required by this Commission.

Violation of PURPA.

26. Each of the Projects is certified as a QF and is entitled under PURPA to sell all of its electrical output DEC and/or DEP pursuant to long-term PPA.

27. PURPA obligates Duke to offer Complainants PPAs of sufficient duration to allow “reasonable opportunities to attract capital from potential investors.” *Windham Solar LLC & Allco Fin. Ltd.*, 157 FERC ¶ 61,134 at P. 8.

28. A PPA with a duration not longer than five years does not provide solar QFs reasonable opportunities to attract capital.

29. By refusing to enter into PPAs with a duration longer than five years, Duke has violated its obligations to Complainants under PURPA.

30. This Commission has the authority and the obligation to oversee and ensure Duke’s compliance with PURPA requirements.

31. Complainants and Birdseye Renewable Energy are represented by counsel in this proceeding:

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CONCLUSION

Based on the foregoing, this Commission should order Duke to act in good-faith consistent with the previous Orders of this Commission, and order Duke to offer commercially reasonable, long-term PPAs and to negotiate with Solar Developers consistent with the Public Utility Regulatory Policies Act of 1978.

WHEREFORE, Complainants pray for the following relief:

a. A Declaratory Order finding that: (i) a Power Purchase Agreement, under current avoided cost rates, with a duration of five or shorter is commercially unreasonable and of insufficient duration to provide the Complainants' Projects with reasonable opportunities to attract capital from potential investors; and (ii) by refusing to enter into PPAs longer than five years with PURPA qualifying facilities, Duke is in violation of its obligations to Complainants under PURPA Section 210, and (iii) by refusing to enter into PPAs longer than five years for Complainants' Projects, Duke is in violation of the Orders of this Commission requiring Duke to negotiate in good-faith; and

b. An Order requiring Duke: (i) to act in good-faith, consistent with the previous Orders of this Commission, and offer commercially reasonable, long-term PPAs, with a duration sufficient to afford the Projects with reasonable opportunities to attract capital; and (ii) to negotiate with Solar Developers consistent with the Public Utility Regulatory Policies Act of 1978; and

c. FOR SUCH OTHER AND FURTHER RELIEF AS IS JUST AND PROPER.

[Signature Page Follows]

Respectfully Submitted,
/S/

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